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No. 84-880

In the Supreme Court OF THE United States

OCTOBER TERM, 1984

SHAMROCK FOODS COMPANY,
an Arizona corporation,

Petitioner,

vs.

STATE OF ARIZONA, DARRYLL J. WALTON and MARTHA WALTON, husband and wife; MICHAEL A. HALL and PEGGY K. HALL, husband and wife; CURRIN SHIELDS and MARJORIE SHIELDS, husband and wife,

Respondents.

Reply Brief in Support of Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. THE PETITION PRESENTS IMPORTANT LEGAL ISSUES, AND THE COURT SHOULD NOT BE MISLED BY RESPONDENTS' ASSERTION THAT THERE IS MERELY A CONFLICT IN THE EVIDENCE.

Respondents' Brief in Opposition attempts to characterize this case as simply a conflict in the evidence. Indeed, the brief discusses the merits of the two legal issues—judicial estoppel and *Illinois Brick*—only briefly.

The Court should not be misled by this tactic. The petition does *not* present merely a conflict in the evidence. After all, this case was decided below as a matter of law by

summary judgment based on *undisputed* facts. Respondents' attempt to avoid those facts does not transform them into disputed facts. Respondents' nearly total reliance on disputing facts merely reveals the weakness of their position on the merits.

Moreover, Respondents' claims about the facts are belied by the record. For example, Respondents repeatedly rely upon "advanced discovery" to justify their change in theory to a retail price conspiracy. (Brief in Opposition at 1, n. 1 and 5, n. 4). Yet the discovery which their brief cites includes the testimony of Mr. McClelland. Respondents took Mr. McClelland's deposition *three years* prior to the settlement based on a pass-on theory. (*Id.* at 2-3, n. 2). Respondents also cite the deposition of Leo Page but that deposition was also taken before the district court's approval of Respondents' settlement on a wholesale price theory. Notably, Respondents admit that their original claim was solely for "a pass-on of wholesale overcharges." (*Id.* at 2, n. 1). No "advanced discovery" suddenly revealed a new and different claim.

Even more interesting, Respondents do not disavow their statements to the district court *after* the decision by the court of appeals. Respondents now apparently claim, without any new discovery, that there was only one conspiracy at all times involving the same actors and involving both wholesale and retail price-fixing. (See Petition at 5-6). This development not only demonstrates the wisdom of the district court's judicial estoppel ruling, but refutes the Ninth Circuit's pivotal conclusion that because two discrete, severable conspiracies existed Respondents could seek damages for retail overcharges without involving any pass-on. 729 F.2d at 1211, 1213.

Respondents also deny that their 90% share of the grocery settlement was based on "their affirmation to the district court that the grocery stores had merely passed on allegedly fixed wholesale overcharges to them." (Brief at 4, n. 3). Yet

in their own motion for approval of the settlement (C.R. 389 at 20), the Respondents told the district court:

> To the extent that consumers claim that *overcharges were passed on to them*, the grocers' recovery is proportionately diminished. . . . Counsel for the grocery store and consumer classes are confident that, by using this weighted measure, the members of their respective classes will each receive a fair share of the settlement fund *proportional to their actual damages suffered*. . . . (Emphasis added).

On the other hand, Respondents mischaracterize the posture of this case. They state that they "have proved that defendant dairy Shamrock Foods Company conspired with grocery stores to fix the retail prices of dairy products." (Brief at i). They have proved no such thing. This case was decided by summary judgment on the judicial estoppel and *Illinois Brick* issues; no trial has been held on the retail claim.

The most that Respondents can say about their proof is that, given a chance, they can prove a conspiracy to fix retail prices. That misses the point, however. The issue is *not* whether Respondent can or cannot prove a retail-level conspiracy. The issue is whether the district court should consider such a claim when first made years after the lawsuit based solely on a wholesale claim was filed, after *Illinois Brick* was decided, after Shamrock settled the wholesale-level claim, and after Respondents reaped great monetary benefits in settling their wholesale claim based on passed-on damages.

Respondents also state that "all parties agree that there were no wholesale overcharges and that any consumer injury resulted solely from retail overcharges." (Brief at i, "Question Presented"). That is incorrect. Shamrock obviously does not agree; if it did agree, it would not have petitioned to this Court. Respondents can hardly deny their own claim, especially when they received a substantial settlement upon their affirmation that they were damaged by passed-on wholesale overcharges.

II. A CONFLICT EXISTS AMONG THE FEDERAL COURTS.

Respondents argue that the Ninth Circuit's decision does not conflict with any decisions of other federal courts. Indeed, Respondents boldly state that "Petitioner does not even attempt to argue" that such a conflict exists. (Brief at 6). That statement simply overlooks the argument in the Petition that the Ninth Circuit's decision contradicts the courts which have applied judicial estoppel "broadly and liberally." (Petition at 15). Moreover, other federal courts have upheld the application of estoppel or similar theories "to prevent antitrust plaintiffs from shifting theories merely to avoid *Illinois Brick*." (Petition at 14-15, citing cases).

More importantly, the opinion below conflicts with this Court's decision in *Illinois Brick*. Instead of analyzing the argument to that effect in the Petition (at 6-11), Respondents merely restate the faulty conclusions reached by the Ninth Circuit. (Brief in Opposition at 6-7).

III. NO ADEQUATE STATE GROUND EXISTS.

Respondents argue that an "adequate state ground" supports the Ninth Circuit's decision. They apparently believe that the mere existence of a state antitrust claim in the case precludes this Court's review. (See Brief in Opposition at 7).

The painfully obvious defect in Respondents' argument is that the "adequate state ground" doctrine applies only to this Court's review of state court decisions. *See generally R. Stern & E. Gressman, Supreme Court Practice* 230 *et seq.* (5th ed. 1978). The doctrine does *not* apply to cases from the federal courts of appeal because of Congress's definitions of the Court's jurisdiction. Congress gave the Court plenary jurisdiction to review "any civil or criminal case" in the federal courts. 28 U.S.C. § 1254(1). However, the jurisdiction over state court judgments was limited to certain federal questions. 28 U.S.C. § 1257. *See generally Murdock v. City of Memphis*, 20 Wall. 590 (1875) (basis of adequate state ground doctrine is jurisdictional statute). The adequate state

ground doctrine is simply not applicable to this case from the Ninth Circuit.

Even if this were a case from a state court, the "adequate state ground" doctrine would not apply. The mere presence of a state claim does not an "adequate state ground" make. First, no state law ground exists where, as here, the courts below decided expressly upon federal law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

Second, even if there were a state law basis for the decision below, it would be neither "adequate" nor "independent": disposition of the state antitrust claim would not put to rest the separate federal antitrust claim and its attendant *Illinois Brick* problem. Nor would it resolve the judicial estoppel issue.

Third, the supposed "state ground" here is really a federal question in state law clothing. The Arizona antitrust statutes incorporate federal antitrust decisional law. Ariz. Rev. Stat. § 44-1412; *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (Ct. App. 1980). Decision of the state law claim thus involved federal law, notably the *Illinois Brick* doctrine. This Court has held that a federal question is presented when resolution of the state law question rests on a determination of federal law. *E.g., Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

The Respondents' argument that an "adequate state ground" warrants denial of certiorari merely reflects the absence of any legitimate reason for denying review of the important judicial estoppel and *Illinois Brick* issues presented by the petition.

CONCLUSION

For the reasons stated in Shamrock's Petition for Certiorari and herein, this Court should grant a Writ of Certiorari to the Ninth Circuit.

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